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70-348

# In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1895~~

ROBERT E. RATH,
Personally, and, for Buckeye Paint & Varnish Company (Defunct), Seaway Hardware & Mfrs' Supply Company (Defunct),
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
To the United States Court of Claims.

ROBERT E. RATH,
3117 Darlington Road,
Toledo, Ohio 43606,
*In Propria Persona.*

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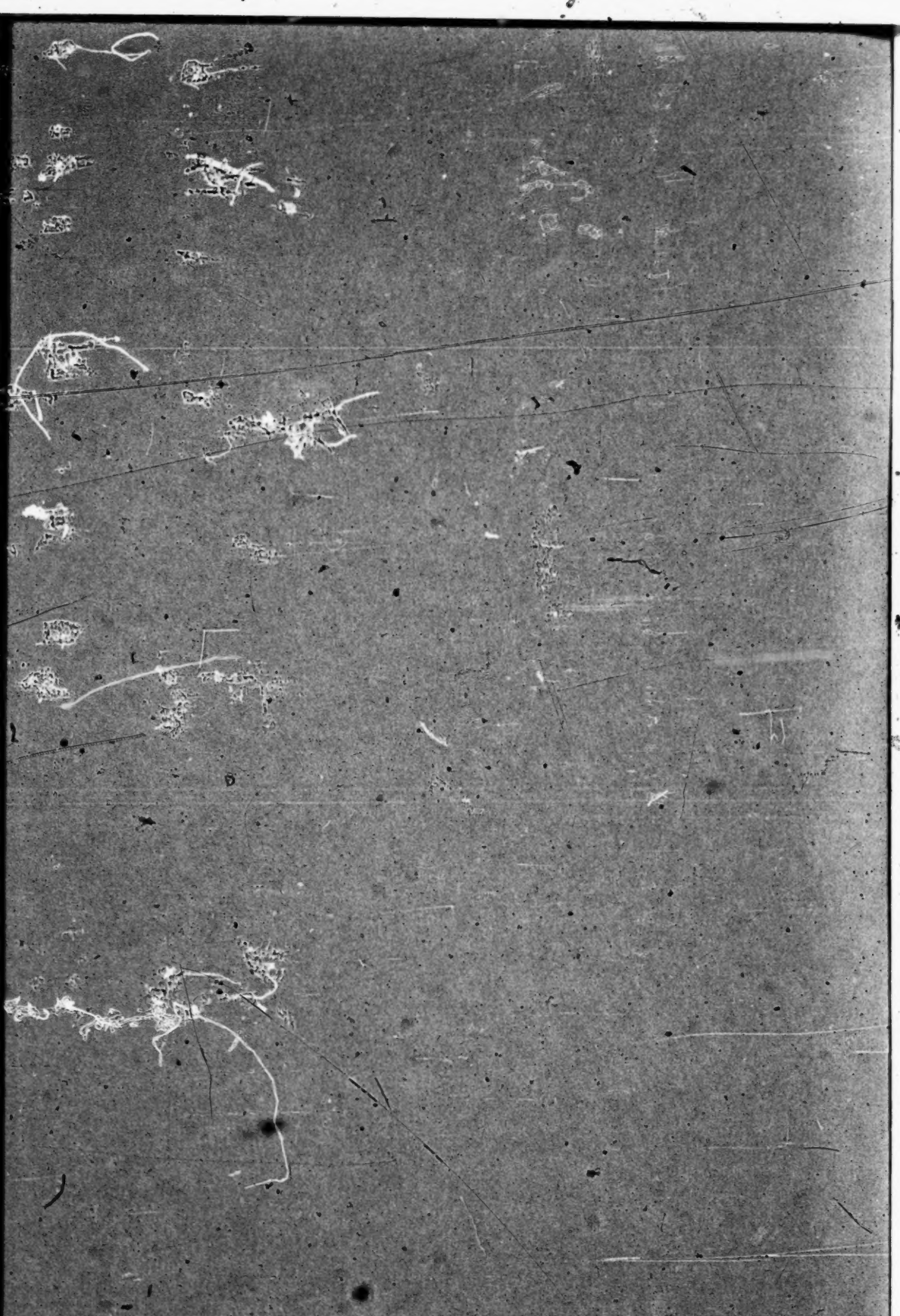

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THE UNITED STATES OF AMERICA,
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## PETITION FOR WRIT OF CERTIORARI
## To the United States Court of Claims.

Petitioner, Robert E. Rath, *in propria persona* petitions for a Writ of Certiorari to review a judgment of the United States Court of Claims.

## OPINIONS BELOW.

The United States Court of Claims granted the Motion of the United States to dismiss without rendering an opinion.

## JURISDICTION.

The judgment of the Court of Claims was entered on April 2, 1971. The jurisdiction of this Court was invoked under 28 U.S.C. 1255.

## QUESTIONS PRESENTED.

If it is alleged in a complaint that the plaintiff suffered loss through the wrongful acts of the United States by reason of:

A. Illegal misapplication of jeopardy assessment, summary collection action, expropriation, and seizure under Sections 6861, 6211, and 6213(a) of the 1964 Internal Revenue Code, and contrary to law when no proper evidence of jeopardy existed,

B. Failure to abate the jeopardy liens when conditions of Sections 6861(g) and 6863(b) had been met, thus forcing destruction of taxpayers' businesses,

C. Negligent mishandling, impairment of contracts, and injurious failure to protect taxpayers' property rights under seizure in violation of Article I, Sec. 1, U. S. Constitution,

Does the Court of Claims have jurisdiction over such claims as founded upon the Constitution, or any Act of Congress or upon an implied contract with the United States or because the claims are for recovery of a sum alleged to have been wrongfully collected under the Internal Revenue Laws?

## STATUTES INVOLVED.

**28 U.S.C. 1491:**

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

**28 U.S.C. 1346:**

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) "Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *"

**26 U.S.C. 6861:**

"(a) Authority for making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof. * * *

(g) Abatement if jeopardy does not exist.—The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. * * *"

**26 U.S.C. 6211:**

"(a) In general.—For purposes of this title in the case of income, estate, and gift taxes, imposed by subtitles A and B, the term "deficiency" means the amount by which the tax imposed by subtitles A or B exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made."

**26 U.S.C. 6863(b)(3)(B):**

"(3) Stay of sale of seized property pending Tax Court decision.—

(A) General rule.—Where, notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable, prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213(a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) Exceptions.—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336."

**28 U.S.C. 6331(a):**

* * * If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section."

## STATEMENT.

I filed my complaint with the U. S. Court of Claims while I was still in prison. My crime was a difference of opinion between me and the income tax authorities. During this period, I studied the record of my conviction, as well as the law on the subject and I became convinced that my attorney, whose incompetence or inadequacy was obvious, had improperly handled the case and failed to raise matters which were plain error. I believed I had been wrongfully convicted, a belief which I still maintain, so I filed a Writ of Habeas Corpus with the District Court which lay with the Court for a period of eight months. In the meantime, my case came up for parole consideration. I asked my Court appointed attorney (not the one who defended me) to see if he could resolve the matter of the Writ of Habeas Corpus. He advised me that he had met with the Judge, and the Judge agreed not to oppose my parole if the writ were withdrawn or dismissed. This was done, and I received my parole in January, 1971. When I left prison, of course, I was faced with many problems, but a major one was the tax assessments and penalties against me pending in the Tax Court in the amount of approximately $200,000.00. By reason of the things I allege in my complaint, I have no assets to pay attorneys for service in the Tax Court or to pursue the case to this Court. That is the reason I appear in *Propria Persona*.

Moreover, had the government not seized and dissipated my assets, I could have hired competent counsel and, no doubt, would have served no time in prison at all. Presently, I have a position teaching retarded children at Toledo DeVilbiss High School, but such income can neither satisfy the government's tax claims nor hire law-

yers. All of my ills are directly attributable to the wrongs of which I complain in the complaint to the Court of Claims, and I am sick at heart.

My complaint is, no doubt, not as explicit and artfully drawn as if it were drawn by a lawyer, but I think it says that I am trying to get back the sums which were taken from me because they were wrongfully collected through an illegal jeopardy assessment and, that in addition, I want recovery because some over-zealous agents of the government, unmindful of my statutory and Constitutional privileges, deliberately destroyed my businesses and allowed my assets to be squandered and dissipated. My proof will be shown that such action was taken to squeeze me into a position where I would be unable to adequately defend myself. For this outrageous conduct, I deserve and want an accounting.

I disagreed with the government whether I had properly filed income tax returns and paid taxes within the demand of the statutes. While the differences of opinion were under discussion, and 1¼ years before I was indicted, government agents contrary to law when no proper evidence existed (as alleged in my complaint) lodged a jeopardy assessment against me under 26 U.S.C. 6861, invoked a summary collection action, expropriation, and seizure. Moreover, the government (as alleged in my complaint) "failed to abate the jeopardy liens when conditions of Section 6861(g) and 6863(b) had been met." Damages were caused by this unlawful and unconstitutional conduct to which was added more damages because as alleged in my complaint, the government failed to protect the taxpayer's property rights under the seizure in violation of Article I, Section 1 of the U. S. Constitution. The Court of Claims, without opinion dismissed my case. Thus, I do not know the reason for its action. Perhaps

even a citizen such as I, who has reached the dregs, ought to be informed why he can't have some satisfaction for the obvious wrongs which have been levied upon him. I appeal to this Court.

## REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

**I. The Court of Claims derives its jurisdiction over the instant action from 28 U.S.C. 1491 because the claims are founded upon the Fifth Amendment in that I have been deprived of my property without due process of law.**

A. While the power of Congress to tax is derived from the Constitution, the Supreme Court has said that it is "equally obliged to give full effect to the constitutional restrictions which attend the exercise of these (taxing) powers," *Marchetti vs. United States,* 390 U.S. 39, 58.

> "* * * and like other great substantive powers of Congress, the power to tax is also, by necessary implication, subject to the Fifth Amendment, which requires that it shall not be exercised without due process of law. Heiner v. Donnan, 285 U.S. 312, 326, 52 S. Ct. 358, 76 L. Ed. 772; Nichols v. Coolidge, 274 U.S. 531, 542, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081; Louisville Joint Stock Bank v. Radford, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106, note 19, May 27, 1935."
>
> *John A. Gebelein, Inc. vs. Milbourne,* 12 F. Supp. 105, 112.

Proof will show, as alleged in my complaint, that a jeopardy assessment was lodged against me under 26 U.S.C. 6861 together with a levy on my assets with no evidence to support it. In order for the government's

action to have met the standards of due process of law, there must have been some evidence to support its action. This Court has said that " * * * it is violative of due process to convict and punish a man without evidence of his guilt." *Thompson vs. Louisville,* 262 U.S. 199. My proof will show, as alleged in my complaint, that I was found guilty by the Secretary or his delegate of these things which the statute requires to support a finding that the collection of my tax was in jeopardy, and I was punished by the imposition of the accelerated levy under 26 U.S.C. 6331 without any evidence to support such finding. Such action not only destroyed my capacity to defend myself, but caused me the catastrophic losses of which I have complained.

Moreover, I was not given an adequate opportunity to contest the government's unlawful action. The finding that the collection of my tax was in jeopardy, and the accelerated levy based thereon, supported by no evidence, was a denial of due process of law. "We have repeatedly held that the conviction on charges unsupported by any evidence is a denial of due process." *International Brotherhood vs. Hardeman,* 28 L. Ed. 2d 10, 21.

(B) The manner in which the Internal Revenue Service acted was so onerous as to constitute a taking for which the Constitution requires compensation. It has been said, " * * * the governmental action in the form of regulations cannot be so onerous as to constitute a taking which requires compensation." *Goldblatt vs. Town of Hemstead, N.Y.,* 399 U.S. 590, 594. The Internal Revenue Service, without cause and with no evidence to support its exercise of the statutory grant of power, seized, squandered, depleted and depreciated my assets in an arbitrary and reckless disregard of its duty to maintain and conserve them. Such arbitrary and onerous misconduct

caused substantial losses to me and (even if the levy had been lawfully made) reduced the value of my assets as an offset or overage in reference to my alleged income tax deficiencies. The shame of it is that I allegedly owe the government more taxes because it onerously took and dissipated my property. Moreover, if it is finally proven that the government is in error in its tax compilations as I contend, I am left with no recovery except the liquidated value of my assets which were substantially depleted by the government's onerous action.

I have clearly been the victim of arbitrary, unreasonable, capricious and oppressive governmental action. I was put out of business and my means of making a living was liquidated. Had I been permitted to continue and had not my assets been unlawfully seized, I might have been able to defend myself through competent counsel and earned that which would have enabled me to meet my alleged income tax deficiencies, if they actually existed. No safeguards were afforded me. I am sure that this Court was talking about a person like me when it said in *United States vs. Robel,* 389 U.S. 258, footnote 11:

> "We recognize in Green vs. McElroy, 360 U.S. 492, 79 S. Ct., at 1411, 3 L. Ed. 137, that the 'right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment.' "

This onerous taking of my property and the government's treatment thereof, requires compensation under the Fifth Amendment.

**II. The Court of Claims derives jurisdiction from 28 U.S.C. 1346 in that I seek recovery of the sum of money derived from the liquidation of my assets wrongfully collected and applied to my alleged tax deficiencies.**

In my complaint, I have clearly alleged the jurisdictional requirements of 28 U.S.C. 1346. I seek the sums held by the government which were wrongfully collected.

**III. The Court of Claims derives jurisdiction from 28 U.S.C. 1491 because my claim is founded upon an implied contract with United States.**

When the government seized my property for its use and purposes under the circumstances detailed herein; an implied contract arose from which sprung the duty and assurance that I would not only be fairly compensated for it, but the government's dominion over it would not result in losses to me by reason of the government's arbitrary, capricious, onerous and unreasonable handling of it. Cf. *United States vs. Bostwick*, 94 U.S. 53.

## CONCLUSION.

While I am one among millions of Americans, the complaint I bring here is not entirely my own. If the maladministration which I have described in my complaint is left unrestrained, millions of American taxpayers will be without any defense against the arbitrary and oppressive actions of the servants of the Internal Revenue Service. Such a result is appalling. Thus, I urge that the Court of Claims be ordered to hear my complaint. For all of us who have been, or will be treated as I have been, the due process questions are substantial.

Respectfully submitted,

ROBERT E. RATH,
*In Propria Persona.*

## APPENDIX.

IN THE UNITED STATES COURT OF CLAIMS.

No. 112-70.

ROBERT E. RATH, PERSONALLY, AND FOR BUCKEYE PAINT & VARNISH COMPANY (DEFUNCT), SEAWAY HARDWARE & MFRS' SUPPLY CO., INC. (DEFUNCT),

v.

THE UNITED STATES,

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

### ORDER.

(Entered April 2, 1971.)

This case comes before the court on defendant's motion, filed October 22, 1970, to dismiss the petition. Upon consideration thereof, together with "petitioner's traverse" in opposition thereto, without oral argument, it is concluded that plaintiff has failed to state a cause of action within the jurisdiction of this court, and

IT IS ORDERED that defendant's said motion to dismiss the petition be and the same is granted and plaintiff's petition is dismissed.